Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Petitioner,

v.

MAGNA BANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a postpetition administrative creditor in a bankruptcy case have standing under 11 U.S.C. § 506(c) to seek payment of its administrative claim from property of the bankruptcy estate that is encumbered by a secured creditor's lien?

STATEMENT PURSUANT TO RULE 29.6

Hartford Fire Insurance Company (the "Parent") owns 100% of the Petitioner's stock. The Parent is not publicly held. The Parent is an indirect subsidiary of The Hartford Financial Services Group, Inc., which is a publicly held company. In addition, the Parent is an affiliate of Hartford Life Insurance Company, which has issued shares to the public.

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Petitioner, Hartford Underwriters Insurance Company ("Hartford"), respectfully requests that the Court grant a Writ of Certiorari to review the *en banc* decision of the United States Court of Appeals for the Eighth Circuit.

DECISIONS BELOW

The unreported decision of the Bankruptcy Court determining that Hartford has standing under 11 U.S.C. § 506(c) to recover its administrative claim from property of the debtor's bankruptcy estate is reprinted in the attached Appendix at App. 45a-59a. The unreported decision of the District Court affirming the Bankruptcy Court is reprinted in the attached Appendix at App. 32a-44a. The panel decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court is reported at 150 F.3d 868 (8th Cir. 1998) and is reprinted in the attached Appendix at App. 21a-31a. The *en banc* decision of the United States Court of Appeals for the Eighth Circuit determining that Hartford lacks standing under 11 U.S.C. § 506(c) is reported at 177 F.3d 719 (8th Cir. 1999) and is reprinted in the attached Appendix at App. 1a-20a. The sole issue decided by the *en banc* Court of Appeals is Hartford's standing under section 506(c).

STATEMENT OF JURISDICTION

The *en banc* decision of the Court of Appeals for the Eighth Circuit was decided on June 7, 1999. This Court has jurisdiction to grant review of this matter by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes involved in this case, 11 U.S.C. § 503 (permitting an administrative claimant to pursue an administrative claim against a debtor's bankruptcy estate), 11 U.S.C. § 506(c) (permitting the recovery of certain postpetition claims from property of a bankruptcy estate that is encumbered by a secured creditor's lien), and 11 U.S.C. § 1109(b) (permitting any party in interest in a bankruptcy case, including any creditor, to raise, appear and be heard on any issue in the case), are reproduced in the attached Appendix at App. 60a-64a.

BASIS OF FEDERAL JURISDICTION

Jurisdiction in the Bankruptcy Court was invoked pursuant to 28 U.S.C. §§ 157 & 1334. Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. § 158(a). Jurisdiction in the Court of Appeals was invoked pursuant to 28 U.S.C. §§ 158(d) & 1291.

STATEMENT OF THE CASE

This matter arises out of the chapter 11 bankruptcy proceedings of Hen House Interstate, Inc. (the "Debtor"). Both before and after the Debtor commenced its bankruptcy case, it operated a number of businesses, including service stations, restaurants, gift stores, and an outdoor advertising firm. Petitioner Hartford Underwriters Insurance Company ("Hartford") supplied workers' compensation insurance to the Debtor during the first year of its bankruptcy proceedings. The instant controversy involves the question of whether Hartford has standing under section 506(c) of the Bankruptcy

Code to recover its administrative claim for unpaid insurance premiums from property of the Debtor's bankruptcy estate that is encumbered by a secured party's lien.

Before the Debtor filed for bankruptcy relief, respondent Magna Bank, N.A. ("Magna") was the Debtor's primary lender, holding a lien on all of the Debtor's real and personal property. After the Debtor commenced its case, it sought approval from the bankruptcy court to borrow additional funds from Magna, and also to pay certain administrative claims incurred during the course of the reorganization proceedings.[1] Magna consented to the financing, and also to the use of its collateral to pay certain of the Debtor's necessary administrative expenses. Subsequently, the Bankruptcy Court entered an order authorizing the financing, and likewise entered an order authorizing and directing the Debtor to pay its necessary operating expenses from Magna's collateral. The authorized expenses included the insurance premiums owed to Hartford. Notwithstanding this order, the Debtor failed to pay in full the premiums due Hartford.

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1. During the course of a chapter 11 bankruptcy case, the debtor typically remains in possession of its property as it attempts to reorganize. *See* 11 U.S.C. § 1101(a) (defining the term "debtor in possession" to mean the debtor), § 1107 (prescribing rights, powers and duties of a debtor in possession in a chapter 11 case), and § 1108 (authorizing the debtor in possession to continue to operate its business in a chapter 11 case). A trustee may be appointed in a chapter 11 case for "cause." *See* 11 U.S.C. § 1104(a). No trustee was appointed during the course of the Debtor's chapter 11 case. As discussed below, however, a chapter 7 trustee was appointed after the Debtor's chapter 11 case was converted to a case under chapter 7. *See* 11 U.S.C. § 702 (providing for the selection of a chapter 7 trustee in a chapter 7 case).

The Debtor's attempt to rehabilitate its businesses was not successful, and after a year in chapter 11, the Debtor's case was converted to a liquidation proceeding under chapter 7, at which time a chapter 7 trustee was appointed. Before the conversion, however, the Debtor was able to sell a number of its properties as going concerns, and Magna received the proceeds of these sales. It is undisputed that, without Hartford's provision of workers' compensation insurance, the Debtor could not have continued to operate.

Hartford commenced the underlying litigation in the Bankruptcy Court to recover its claim for unpaid postpetition insurance premiums from the Debtor's estate. Hartford sought relief pursuant to 11 U.S.C. § 503(b), which expressly provides for the allowance of administrative claims against an estate in bankruptcy. Because all of the estate's property (including all available cash) was encumbered by Magna's lien, Hartford also sought relief pursuant to 11 U.S.C. § 506(c), which expressly provides for the payment of allowed administrative claims from a secured creditor's collateral to the extent that the incurrence of the expense provided a benefit to the secured party.

The Bankruptcy Court allowed Hartford's claim under section 503(b), and likewise ruled that Hartford could recover payment from property encumbered by Magna's lien under section 506(c). In reaching its decision, the Bankruptcy Court relied on *United States, IRS v. Boatmen's First National Bank*, 5 F.3d 1157 (8th Cir. 1993), a prior Eighth Circuit decision holding that the United States had standing to pursue an administrative tax claim under section 506(c). (App. at 51a-55a.) On appeal, the District Court affirmed. (App. at 44a.)

On further appeal, a three-judge panel of the Eighth Circuit followed *Boatmen's*, and also affirmed on the standing question. *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868, 871 (8th Cir. 1998) (hereinafter, the "Panel Decision") (the Panel Decision is reprinted in the attached Appendix at App. 21a-31a). Subsequently, the Court of Appeals granted rehearing *en banc* limited to the issue of standing. In a split 6-5 decision, the *en banc* court expressly overruled *Boatmen's* and held that Hartford lacks standing to pursue its claim under section 506(c). *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 177 F.3d 719, 721 & 725 (8th Cir. 1999) (hereinafter, the "En Banc Decision") (the En Banc Decision is reprinted in the attached Appendix at App. 1a-20a). The court concluded that only a trustee (or debtor in a chapter 11 case) has standing to recover payment of an unpaid administrative claim from a secured creditor's collateral under this section. In reaching this conclusion, the court expressly recognized that the various Courts of Appeals are split on the standing issue. *See id.* at 723 (App. at 8a).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS RENDERED A DECISION THAT DEEPENS AN EXISTING CONFLICT AMONG THE COURTS OF APPEALS ON THE ISSUE OF WHETHER AN ADMINISTRATIVE CLAIMANT HAS STANDING TO PURSUE PAYMENT OF ITS CLAIM UNDER 11 U.S.C. § 506(c).

The decision below denying Hartford standing under section 506(c) deepens an existing conflict among the six United States Courts of Appeals that have decided this issue. Moreover, by advocating the minority view, the decision below has only worsened the disarray among the Circuits, which are now split 4-2 on the standing question.[2] As the Eighth Circuit specifically noted in the En Banc Decision, "Hartford correctly points out that our conclusion here is not the consensus of the circuits that have considered the issue." *In re Hen House Interstate, Inc.*, 177 F.3d at 723 (App. at 8a).

Section 506(c) provides that "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expense of preserving, or disposing of, such property to the extent of any benefit to the holder of [the secured] claim." 11 U.S.C. § 506(c). In addressing the standing of administrative claimants to pursue recovery under this section, the Courts of Appeals have

2. Mirroring the split in the Circuits, the individual judges below were similarly divided (6-5) on whether Hartford had standing under section 506(c).

embraced two irreconcilable interpretations. In the majority, four Courts of Appeals have concluded that the section should not be read as though it provided that "only" trustees may pursue relief under its terms, and have expressly held that unpaid administrative claimants have standing to recover payment. *See Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995); *North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991), *cert. denied*, 506 U.S. 821 (1992); *In re Parque Forestal, Inc.*, 949 F.2d 504, 511-12 (1st Cir. 1991); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74, 77 (5th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91, 94 (3d Cir. 1986). This majority view prevailed in the Eighth Circuit until the En Banc Decision. *See United States, IRS v. Boatmen's First Nat'l Bank*, 5 F.3d 1157 (8th Cir. 1993), *overruled by In re Hen House Interstate, Inc.*, 177 F.3d at 721 (App. at 12a).

The minority view among the circuit courts — first articulated by the United States Court of Appeals for the Fourth Circuit — construes section 506(c) as though it stated that "only" a trustee may pursue relief under its terms, holding that administrative claimants are without standing to pursue recovery of their claims. *See Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994). *See also Loudoun Leasing Dev. Co. v. Ford Motor Credit Co. (In re K & L Lakeland, Inc.)*, 128 F.3d 203, 206 (4th Cir. 1997). The *en banc* ruling in the court below adopts this minority position.

This Court should resolve the conflict among the Courts of Appeals to prevent further inconsistency on the issue of the standing of administrative creditors under section 506(c). The current disarray in the case law has sowed confusion and controversy, particularly among the district and bankruptcy courts. *Compare Cavender v. Ameritrust Co., N.A. (In re Opti-Gage, Inc.)*, 124 B.R. 515, 518 (Bankr. S.D. Ohio 1991) (recognizing the standing of an administrative claimant to recover its claim from a secured creditor's collateral under section 506(c)), *with Williams v. Bank One Cleveland, NA (In re Dyac Corp.)*, 164 B.R. 574, 581 (N.D. Ohio 1994) (holding that only a trustee can recover under section 506(c)); *compare In re Oakland Care Ctr., Inc.*, 142 B.R. 791, 796 (E.D. Mich. 1992) (holding that only a trustee has standing under section 506(c)), *and Dock's Corner Assocs. v. Boyd (In re Great Northern Forest Prods., Inc.)*, 135 B.R. 46, 64-66 (Bankr. W.D. Mich. 1991) (same), *with McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991) (adopting the majority view and concluding that parties other than trustees have standing); *compare Shaw, Licitra, Parente, Esernio & Schwarz, P.C. v. Travelers Indem. Co. (In re Grant Assocs.)*, 154 B.R. 836, 841 (S.D.N.Y. 1993) (concluding that an administrative creditor has standing under 506(c)), *and In re Croton River Club, Inc.*, 162 B.R. 656, 663-64 (Bankr. S.D.N.Y. 1993) (same), *with In re Crescenzi*, 1995 WL 753906 at *5 (S.D.N.Y. Dec. 19, 1995) (acknowledging the majority view but concluding that that the appellant's claim under section 506(c) was improper for lack of standing). *See also In re Bluffton Castings Corp.*, 224 B.R. 902, 903 (Bankr. N.D. Ind. 1998) (holding that the claimants, who were not trustees, lacked standing under section 506(c)); *In re Scopetta-Senra Partnership III*, 129 B.R. 700, 701 (Bankr. S.D. Fla. 1991) (concluding that parties other than trustees

have standing under section 506(c)).[3] Moreover, permitting this conflict to continue is not likely to provide additional insight into how the standing question should be resolved. Six Courts of Appeals (and innumerable lower courts) have already explored extensively the relevant issues,[4] and the split vote of the judges of the court below further attests to the issue's divisiveness. In order to avoid additional conflict and needless litigation, the Court should grant the Writ to resolve the split of authority at this time.

II.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH ESTABLISHED PRECEDENTS OF THIS COURT GOVERNING THE DETERMINATION OF A PARTY'S STANDING TO PURSUE STATUTORY RELIEF.

As pointed out by the five dissenting judges of the *en banc* court, the majority opinion fails to apply the relevant precedents of this Court establishing the correct method for

3. There are numerous additional district and bankruptcy court citations. *See In re Great Northern Forest Prods., Inc.*, 135 B.R. at 62-63 (listing additional cases); 4 Lawrence P. King, *et al.*, *Collier on Bankruptcy*, ¶ 506.05[8] at 506-141-143 nn.46-48 (15th ed. rev. 1999) (same).

4. In addition, the issue has generated substantial scholarly commentary. *See* Justin T. Toth, *Rehabilitating Bankruptcy Code Section 506(c): Should Third Party Claimants Have Independent Standing?*, 16 W. New Eng. L. Rev. 1 (1994) (analyzing the standing issue, including the split of authority among the courts); Barry L. Zaretsky, *Standing To Recover Costs, Expenses from Collateral*, 212 N.Y.L.J. 3 (July 21, 1994) (same).

determining a party's standing to pursue relief under a federal statutory scheme. As this Court has held, standing to pursue relief under a federal statutory scheme must be determined in accordance with "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (cited in *In re Hen House Interstate, Inc.*, 177 F.3d at 726 (Heaney, J., dissenting)). *See also Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Data Processing Serv. v. Camp*, 397 U.S. 150, 153 (1970). First, on the constitutional side of the analysis, the claimant must satisfy the case and controversy requirement of Article III. *See Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 663-664 (1993). *See also Bennett v. Spear*, 520 U.S. at 162; *Flast v. Cohen*, 392 U.S. 83, 101 (1968). Second, the claimant must satisfy the relevant prudential standing requirement; such as, for example, whether the interest that the party in question seeks to vindicate arguably lies within the "zone of interests" sought to be protected or regulated by the particular statutory scheme in question. *See Bennett v. Spear*, 520 U.S. at 162; *Data Processing Serv. v. Camp*, 397 U.S. at 153.

Here, the majority of the Eighth Circuit ignored both aspects of this two-part test in concluding that Hartford lacks standing to recover its claim under section 506(c).[5] *See In re Hen House Interstate, Inc.*, 177 F.3d at 722-24

5. As explained by the dissenting judges in the court below, and more fully above, Hartford has standing under both Article III and the prudential standing requirement to assert its section 506(c) claim because Hartford has a clear economic interest in obtaining payment of its claim, and its interest falls within the zone of interests sought to be protected by the statute. *See In re Hen House Interstate, Inc.*, 177 F.3d at 726-27 (Heaney, J., dissenting).

(App. 5a-12a). Instead of applying this test, the court below simply ruled that section 506(c) does not expressly list administrative claimants as parties with standing under its terms, and, therefore, that administrative claimants must be excluded from the statute's scope. In essence, the court ruled that, unless a particular party is identified *expressly* in a bankruptcy statute as having standing to pursue relief under the statute's provisions, then that party is presumptively prohibited from doing so, even though no express prohibition can be found in the statutory text. As this Court has ruled, however, the zone of interests test adopts precisely the opposite approach. Specifically, although the breadth of the test may vary "according to the provisions of the law at issue," *Bennett*, 520 U.S. at 163, the test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). *See also National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927, 935 (1998).

As this Court held unanimously in *Bennett*, "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." *Bennett v. Spear*, 520 U.S. at 163. As is relevant here, nothing in the Bankruptcy Code purports to negate application of the zone of interests test in the context of applying section 506(c). On the contrary, other provisions of the Bankruptcy Code codify the zone of interests approach as a rule of general applicability in bankruptcy proceedings.

Most significantly, section 1109(b) expressly provides that "[a] party in interest, including . . . a creditor, . . . may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b) (a copy of section

1109(b) is reprinted in the attached Appendix at App. 64a). As explained in the leading treatise on bankruptcy law: "In any particular chapter 11 matter involving a section of the Code, at least two statutes bearing on standing always apply: the particular substantive statute involved *and* section 1109(b)." 7 Lawrence P. King, *et al., Collier on Bankruptcy*, ¶ 1109.04[4][b][i] at 1109-43 (15th ed. rev. 1999) (citations omitted). Moreover, as explained by the Court of Appeals for the Seventh Circuit, section 1109(b) means that

> anyone who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains, thus making explicit what is implicit in an *in rem* proceeding — that everyone with a claim to the *res* has a right to be heard before the *res* is disposed of since that disposition will extinguish all such claims.

In re James Wilson Assocs., 965 F.2d 160, 169 (7th Cir. 1992).

Section 506(c) governs the payment of an administrative expense from property of a debtor's bankruptcy estate if the property in question is encumbered by a lien in favor of a secured party. Before the relevant collateral is disposed of, and the proceeds turned over to the secured creditor, the unpaid administrative claimant has an interest, covered by section 506(c), in having its claim paid from that property. *See* 4 Lawrence P. King, *et al., Collier on Bankruptcy*, ¶ 506.05[1] at 506-126 (15th ed. rev. 1999) (discussing the purpose of section 506(c)). In concluding that Hartford lacks standing to pursue relief under section 506(c), the majority of the *en banc* court crafted a new rule of standing that effectively ignores Hartford's interest, overlooks this Court's

standing precedents, and misperceives the express standing rules codified in section 1109(b).[6]

The rule adopted by the *en banc* court is an unfortunate precedent. In the bankruptcy context, a party's ability to participate in the process and vindicate its own interests is essential to the successful operation of the current statutory scheme, and also to ensure that the party's interests are protected. Few issues in bankruptcy are more important than a creditor's right of participation. As this Court has recently explained, in enacting the reorganization provisions of the Bankruptcy Code, "Congress adopted the view that creditors . . . are very often better judges of . . . their own economic self-interest than courts, trustees, or [governmental agencies]." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1424 n.28 (1999) (citation and quotation marks omitted). Indeed, implicit in the bankruptcy process as a whole, and explicit in the text of section 1109(b), is the unmistakable preference that creditors should have the right to champion their own interests on their own behalf. In this instance, the court below adopted and applied a restrictive standing analysis at odds with this recognized principle. Because the lower court's ruling also conflicts with the Court's standing precedents, and misconstrues an important provision of federal bankruptcy law, the ruling should be reviewed at this time.

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6. Among other things, the *en banc* court dismissed the relevance of section 1109(b) with the observation that the Debtor's bankruptcy case had been converted from a chapter 11 proceeding to a proceeding under chapter 7, and, thus, that section 1109(b) was no longer germane. *In re Hen House Interstate, Inc.*, 177 F.3d at 722 n.3. The essential point remains, however, that, regardless of the conversion of the Debtor's case from one chapter to another, this Court's prudential standing doctrine still applies, and there is nothing in the Bankruptcy Code that purports to negate its application here.

III.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT REQUIRING THAT SECTION 506 OF THE BANKRUPTCY CODE BE CONSTRUED IN A MANNER CONSISTENT WITH OTHER APPLICABLE PROVISIONS OF THE CODE.

As this Court has observed repeatedly, the Bankruptcy Code, like other statutory schemes, should be construed as a whole, and not as a collection of unrelated provisions. *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (construing sections 361, 362, and 506 of the Bankruptcy Code, and observing that "[s]tatutory construction . . . is a holistic endeavor"); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) (stating that "[t]o fix the meaning of these provisions [of the Bankruptcy Act] there is a need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."). *See also United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (stating that "[o]ver and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy.' ") (citation omitted). The court below, however, violated this well-established principle by construing section 506(c) virtually in a statutory vacuum.

Among other things, section 506(c) should be construed in conjunction with section 503(a). Section 503(a) authorizes "[a]n entity [to] file a request for payment of an

administrative expense. . . ." 11 U.S.C. § 503(a) (a copy of section 503(a) is reprinted in the attached Appendix at App. 60a-62a). Moreover, the legislative history to section 503(a) likewise establishes that an administrative claimant has standing to pursue its own administrative claim on its own behalf. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 355 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 66 (1978) (stating that a creditor may file its own administrative claim).

As is relevant here, section 503 specifies the kinds of expenses that may be recovered from a bankruptcy estate on a priority basis as a proper postpetition administrative claim. *See* 11 U.S.C. § 507(a) (specifying the priority of administrative claims). In turn, section 506(c) specifies the kinds of administrative expenses that may be recovered from estate property that is encumbered by a lien. Section 506(c) does not provide a cause of action against the secured creditor; it merely explains how encumbered property of the bankruptcy estate is to be distributed among the various claimants, including the secured party. In other words, section 506(c) is nothing more than a priority provision. It makes no sense to conclude that an administrative claimant has standing to pursue its own claim against the bankruptcy estate under section 503(a), but not the claim's priority under section 506(c), and must rely on a bankruptcy trustee (or debtor in a chapter 11 case) to do so.

More important, as explained previously, section 1109(b) confers express rights of standing on parties in interest, including creditors. *See* 11 U.S.C. § 1109(b) (App. 64a). As explained in the legislative history, section 1109(b) provides "in unqualified terms, that any creditor . . . shall have the right to be heard as a party in interest under this

chapter in person, by an attorney, or by a committee." S. Rep. No. 989, 95th Cong., 2d Sess. 116 (1978). *See also* 124 Cong. Rec. H11,102 (daily ed. Sept. 28, 1978). As the existence of section 1109(b) makes plain, no individual provision of the Bankruptcy Code is necessarily its own arbiter of standing. Rather, the existence of provisions like section 1109(b) demonstrates that the Code relies for its operation on general standing principles of broad application, obviating the need to enumerate repetitively in each statutory section the precise parties that may pursue relief under the terms of that section.

Moreover, consistent with the Code's general principles of standing, in situations in which Congress intends to prevent a party from seeking relief under a particular provision of the Code, it affirmatively and expressly *excludes* that party from the scope of the particular statute.

For example, section 707(b) governs who may request dismissal of a chapter 7 case for "substantial abuse." Significantly, section 707(b) does not simply authorize certain parties to pursue relief under this provision as a means to identify the parties with standing. On the contrary, it expressly provides that relief under the section may be sought by "the court, on its own motion or on a motion by the United States trustee, *but not at the request or suggestion of any party in interest.*" 11 U.S.C. § 707(b) (emphasis added).

Similarly, in defining who may be a debtor under the various chapters of the Bankruptcy Code, the various subsections of section 109 are quite specific in delimiting the persons with and without the requisite standing. For example, section 109(a) provides that "*only* a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this

title." 11 U.S.C. § 109(a) (emphasis added). Likewise, section 109(d) provides that "[*o*]*nly* a person that may be a debtor under chapter 7 of this title, *except* a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title." 11 U.S.C. § 109(d) (emphasis added). *See also* 11 U.S.C. § 303(a) (stating that the section applies "only" against certain persons, and not others), § 307 (providing that the United States trustee may raise, appear and be heard on any issue "but may not file a plan"), § 341(c) (directing that the court "may not preside at, and may not attend" a meeting of creditors), § 702(a) (specifying that "only" certain creditors may vote for a trustee), § 706(c) (expressly limiting relief under the section to the debtor), § 1109(a) (expressly limiting the standing of the Securities and Exchange Commission to take an appeal), § 1112(c) (expressly limiting relief under the section to the debtor), § 1112(d) (same), § 1121(b) (providing that "only" the debtor may file a plan for a prescribed period of time), § 1121(e) (same), § 1164 (providing that certain governmental agencies may raise issues and appear and be heard, but may not take an appeal), § 1303 (specifying certain rights of the debtor "exclusive" of the trustee), § 1304(b) (same), § 1307(c)(9) (prescribing that "only" the United States trustee may request certain relief), and § 1307(c)(10) (same).

As the numerous examples cited above make clear, when Congress intends to limit who may pursue relief under a particular chapter or section of the Code, it does so either: (i) by stating that "only" certain parties may pursue relief under that section or chapter; or (ii) by specifically excluding certain parties. This approach, of course, is only logical: it would make no sense for Congress to have enacted standing provisions of general applicability (e.g., section 1109(b)) if Congress had intended each section of the Code to be self-contained on the standing question.

The court below adopted the rule that only parties that are expressly authorized to pursue relief under a particular section of the Code may do so. Thus, the court reasoned, because section 506(c) mentions trustees but not administrative claimants, therefore administrative claimants cannot recover under the section. As support for its analysis, the court recited the "ancient canon stating that *expressio unius est exclusio alterius* [the mention of one thing excludes others]." *In re Hen House Interstate, Inc.*, 177 F.3d at 722 n.4. But as this Court has observed, while "[i]t is often a valuable servant, [the *expressio* maxim is] a dangerous master to follow in the construction of statutes. . . ." *Ford v. United States*, 273 U.S. 593, 612 (1927) (citation omitted). As the Court further explained in *Ford*, "the 'exclusio' is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice." *Id.* (citations and internal quotations marks omitted). In this case, the admonition provides compelling advice precisely because use of the *exclusio* maxim to deny administrative claimants standing under section 506(c) conflicts with the overall structure, language, and logic of the Bankruptcy Code, and imposes a dysfunctional limitation on the statutory text that is not warranted or compelled by the words of the statute itself. *Cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947) (observing that "[o]ne must listen attentively to what [a statute] does not say.").

As this Court has properly concluded, section 506 should be construed in conjunction with its sister statutes, including sections 503(a) and 1109(b). As these and other sections of the Bankruptcy Code make plain, the *en banc* court's restrictive interpretation of section 506(c) is unsound, and should be reviewed and corrected at this time.

IV.

THE COURT OF APPEALS' RULING IS IN CONFLICT WITH THIS COURT'S PRIOR DECISION IN *MEYER v. FLEMMING.*

In *Meyer v. Flemming*, 327 U.S. 161 (1946), this Court addressed the argument under the prior Bankruptcy Act that, after the commencement of a bankruptcy proceeding and the appointment of a bankruptcy trustee, the debtor no longer had standing to prosecute a cause of action that he had previously commenced prior to filing for bankruptcy relief. In analyzing the matter, the Court recognized the general rule that, once a bankruptcy action has commenced, the right to prosecute a prepetition cause of action against third parties rightfully vests in the bankruptcy estate to be pursued by the trustee. *Id.* at 165. The Court also held, however, that "[i]f, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation." *Id.* at 166. Although the *en banc* court in this case ignored the analysis in *Meyer*, the logic of the decision applies.

If administrative claimants are not entitled to pursue their own claims for relief under section 506(c), the claims of these parties often will not be pursued at all. *See McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991) (observing that "[b]ecause the trustee and debtor have no economic incentive to seek . . . recovery [under section 506(c) on behalf of an unpaid administrative claimant], the secured creditor may obtain a windfall at the expense of the unpaid claimant if the Court were not to recognize the claimant's independent right to

sue under 506(c).") (citations and internal quotation marks omitted). The present case well illustrates this concern. Here, the chapter 7 trustee has no funds to litigate with Magna because Magna holds a lien on all of the estate's assets, and Magna has refused even to release funds to pay administrative claims that it previously agreed should be paid from its collateral. Moreover, the trustee has no interest in pursuing relief against Magna on Hartford's behalf. Trustees in bankruptcy represent the general creditors of the debtor's estate, and have little incentive to use scarce estate assets to litigate against well-funded secured creditors for the benefit of a single postpetition claimant. Magna knows this. That is why Magna has fought to establish the precedent that only trustees may pursue relief under section 506(c) — to obtain on a procedural ground the very windfall that section 506(c) was intended to prevent. *See* 4 Lawrence P. King, *et al.*, *Collier on Bankruptcy*, ¶ 506.05 at 506-125 (15th ed. rev. 1999) (observing that the purpose of section 506(c) is to ensure that certain administrative expenses that benefit the secured creditor are paid from the secured creditor's collateral to prevent the secured creditor from receiving a windfall at the expense of the administrative creditor). *See also Architectural Bldg. Components v. McClarty, (In re Foremost Mfg. Co.)*, 137 F.3d 919, 923 (6th Cir. 1998) (observing that "[t]he plain purpose of § 506(c) — to prevent unjust enrichment of secured creditors — is one that may be important to parties other than to the trustee, and the trustee's interest may not be significant enough to spur him to act. When courts allow these other parties to seek surcharges, they are improving the probability that the statute's true purpose will be vindicated.").

Whether because of the disproportionate expense involved in pursuing the matter, a lack of funds, the

uncertainty of the outcome, or simply the trustee's general reluctance to pursue relief on behalf of a single claimant, an unpaid administrative creditor should be entitled to pursue its own claim for relief under section 506(c). *Cf. Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 67 (1992) (observing that "the power to enforce the performance of [a statutory remedy] must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist."). Because the court below failed to adhere to this principle as articulated in the bankruptcy context in *Meyer*, the Court should grant review of the case at this time.

CONCLUSION

For the foregoing reasons, Hartford respectfully requests that the Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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September 3, 1999

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JUNE 7, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-3859

In re: Hen House Interstate, Inc.,

Debtor.

Hartford Underwriters Insurance Company,

Movant – Appellee,

v.

Magna Bank, N.A., formerly known as Magna Bank of Illinois, N.A.,

Respondent – Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 22, 1998

Filed: June 7, 1999

Before BOWMAN,[1] Chief Judge, HEANEY, McMILLIAN, RICHARD S. ARNOLD, FAGG, WOLLMAN, BEAM,

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1. The Honorable Pasco M. Bowman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the end of the day on April 23, 1999. He has been succeeded by the Honorable Roger L. Wollman.

Appendix A

LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, *en banc*.

BOWMAN, Chief Judge.

Magna Bank, N.A., appeals the judgment of the District Court affirming the judgment of the Bankruptcy Court in favor of Hartford Underwriters Insurance Company. The sole question presented for review by the Court en banc is the threshold question of whether Hartford has statutory standing to surcharge Magna's collateral under 11 U.S.C. § 506(c) (1994). We reverse.

I.

Magna[2] made various loans to Hen House Interstate, Inc. (Debtor), which owned and operated a number of restaurants, service stations, gift stores, and an outdoor advertising firm. To secure the loans, Magna took a security interest in essentially all of the Debtor's real and personal property. On September 5, 1991, the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri. When the Debtor filed its petition, it was indebted to Magna in the amount of approximately $4.1 million. The Debtor retained possession of its assets and continued operation of its businesses after commencing the Chapter 11 proceedings.

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2. Magna is the successor in interest to Landmark Bank of Illinois. We refer to Magna herein notwithstanding that some of the facts pertain to Landmark Bank prior to its acquisition by Magna, and notwithstanding that on October 9, 1998 Magna was absorbed by merger into Union Planters National Bank.

Appendix A

The day after the Debtor filed its Chapter 11 petition, Magna agreed to lend the Debtor an additional $300,000 to help finance the Debtor's post-petition reorganization efforts. The Bankruptcy Court approved the loan agreement in its final financing order and authorized the Debtor to use the proceeds of the post-petition loan and the cash collateral that was subject to Magna's security interest to pay expenses set forth in an appended budget. The budget allowed for workers' compensation expenses in the amount of approximately $8600 per month. Upon approval of the loan agreement, Magna disbursed the entire $300,000 of loan proceeds to the Debtor.

Despite the additional financing provided under the post-petition loan agreement, the Debtor's attempts at reorganization failed. In January 1993, the Bankruptcy Court converted the Debtor's Chapter 11 case into a Chapter 7 liquidation proceeding and appointed a trustee of the Chapter 7 estate.

During the Debtor's attempted Chapter 11 reorganization, Hartford provided workers' compensation insurance coverage to the Debtor. The terms of the insurance policy required the Debtor to pay a premium to Hartford each month. The Debtor made an initial premium deposit and a subsequent premium payment, but otherwise failed to pay the monthly premium required by the policy. The unpaid premiums amount to $51,871.40.

When the Chapter 11 reorganization failed and the Debtor's case was converted to a Chapter 7 proceeding, Hartford brought an action pursuant to Bankruptcy Code § 503 seeking the allowance of its claim as an administrative

expense and Bankruptcy Code § 506(c) seeking to recover the unpaid premiums by surcharging Magna's collateral. The Bankruptcy Court, following the holding of a three-judge panel of our Court in *United States, Internal Revenue Service v. Boatmen's First National Bank*, 5 F.3d 1157, 1159 (8th Cir. 1993), that non-trustees have standing under § 506(c) to surcharge a secured creditor's collateral, determined that Hartford had standing to seek recovery pursuant to § 506(c) and ordered the surcharge of Magna's collateral. Magna appealed to the District Court claiming, *inter alia*, that § 506(c) did not accord Hartford standing to assert its claim. The District Court, also relying on *Boatmen's*, affirmed the judgment of the Bankruptcy Court, and Magna appealed to this Court.

A three-judge panel of this Court affirmed the judgment of the District Court, holding, among other things, that *Boatmen's* was controlling and that Hartford therefore had standing to seek recovery under § 506(c). But two members of the panel expressed their belief that *Boatmen's* had been wrongly decided and should be reconsidered by the Court en banc. *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868, 871 n.4 (8th Cir. 1998); *id.* at 873 (Hansen, J., concurring). We granted Magna's suggestion for rehearing en banc on the issue of Hartford's standing to seek recovery and vacated the panel opinion. We now overrule *Boatmen's* to the extent it construes § 506(c) to empower a non-trustee to surcharge an allowed secured creditor's collateral under that section and hold that Hartford, a non-trustee claimant, lacks standing to assert a § 506(c) claim.

II.

As the second reviewing court, we apply the same standard as that applied by the District Court; we review de novo the Bankruptcy Court's determination of the single issue of law presented here. *See Halverson v. Estate of Cameron (In re Mathiason)*, 16 F.3d 234, 235 (8th Cir. 1994).

Initially, we note that Hartford asserts no claim against Magna or its collateral outside of the Hen House bankruptcy proceeding. The nature and extent of the potential liability of Magna, as an allowed secured creditor in that bankruptcy proceeding, is established by the Bankruptcy Code; more particularly, it is established for purposes of this case by § 506(c). Despite arguments made by Hartford asserting its § 506(c) standing to surcharge property securing Magna's claim based on other provisions of the Bankruptcy Code, the fact is that § 506(c) is the only provision of the Code that directly addresses the issue of standing that is before us. Moreover, § 506(c) is the only provision of the Code that authorizes any party to a bankruptcy proceeding to recover from property securing the claim of an allowed secured creditor such as Magna. It would be extremely odd were Congress to have expanded the potential § 506(c) liability of allowed secured creditors by means of the other Code provisions put forward by Hartford, which in one way or another deal with the assertion of claims against the bankruptcy estate, as distinguished from claims against the property of allowed secured creditors.[3] We do not believe

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3. The general rule is that administrative expenses cannot be charged against secured collateral and are chargeable against only the unsecured collateral of the estate pursuant to Bankruptcy Code (Cont'd)

Congress intended to do any such thing and, therefore, we focus on § 506(c).

Section 506(c) clearly states, "*The trustee* may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c) (1994) (emphasis added). The proper construction of any statute, the Bankruptcy Code included, begins with the language of the statute itself. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (construing Bankruptcy Code § 506(b) according to its plain

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(Cont'd)
§ 503. *See* 11 U.S.C. § 503(a) (1994); *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 324 (3d Cir. 1995); *In re Swann*, 149 B.R. 137, 143 (Bankr. D.S.D. 1993). Therefore, Hartford, despite its argument to the contrary, may not seek to surcharge Magna's collateral under § 503 and may look only to § 506(c) for that purpose.

Hartford seeks standing under Bankruptcy Code § 1109(b) as well, *see* 11 U.S.C. § 1109(b) (1994) ("A party in interest, including . . . a creditor . . . may raise and may appear and be heard on any issue in a case under this chapter."), but § 1109(b) is not the correct avenue for recovery for the reason that § 1109(b) is inapplicable to the Chapter 7 proceeding which underlies this case. *See in re Taylor & Assocs., L.P.*, 191 B.R. 374, 381-82 n.5 (Bankr. E.D. Tenn. 1996) ("Section[ ] 1109 . . . [is] applicable exclusively to Chapter 11 cases and ha[s] no application to Chapter 7."); *cf. In re Polo Club Apartments Assocs. L.P.*, 150 B.R. 840, 856-57 (Bankr. N.D. Ga. 1993) (noting that subchapter I of Bankruptcy Code Chapter 11 applies only in cases Under Chapter 11, and does not apply to a case converted from Chapter 11 to Chapter 7).

language); *Harmon v. United States*, 101 F.3d 574, 583 (8th Cir. 1996). The natural reading of § 506(c) entitles only the trustee to seek to surcharge property securing the claim of an allowed secured creditor under that section.[4] When the language of the Bankruptcy Code is clear and unambiguous, "our sole function . . . is to enforce it according to its terms." *Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993) (internal quotations and citations omitted) (interpreting "unqualified terms" of Bankruptcy Code § 506(b)); *see also Patterson v. Shumate*, 504 U.S. 753, 761, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) (stating clarity of § 541(e)(2) of Bankruptcy Code obviates need for inquiry beyond language of statute).

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4. Hartford has made an issue of Bankruptcy Code § 1107(a), which provides that Chapter 11 debtors in possession shall, with some exceptions, have "all the rights . . . and powers, and shall perform all the functions and duties," of trustees. 11 U.S.C. § 1107(a) (1994). The express language of § 1107(a) therefore compels the unremarkable conclusion that Chapter 11 debtors in possession may do most of the things trustees may do. In this case, Hartford is neither a Chapter 11 debtor in possession nor a bankruptcy trustee.

Likewise, though Bankruptcy Code §§ 901, 902 and 1203 explicitly grant municipalities in Chapter 9 cases and family farmers in Chapter 12 cases some of the rights, powers, functions and duties of trustees serving in cases under Chapter 11, *see* 11 U.S.C. §§ 901(a), 902(5), 1203 (1994), this is not a Chapter 9 or 12 case and Hartford is not a municipality or a family farmer seeking to reorganize. That Congress chose to expressly grant the enumerated parties carefully circumscribed trustee status in limited circumstances demonstrates only that, had Congress intended a claimant such as Hartford to have § 506(c) standing in the present circumstance, it would have said so. Particularly appropriate here is the ancient canon stating that *expressio unius est exclusio alterius*.

Hartford correctly points out that our conclusion here is not the consensus of the circuits that have considered the issue. A majority of those circuits has held that § 506(c) grants standing to non-trustees to pursue surcharge claims under that section. *See Loudoun Leasing Dev. Co. v. Ford Motor Credit Co. (In re K & L Lakeland, Inc.)*, 128 F.3d 203, 206 (4th Cir. 1997) (listing cases). But each of the circuits arriving at a conclusion contrary to the one we reach today has done so by circumventing the plain language of the statute and resting its determination instead upon policy considerations and equitable concerns. *See In re Parque Forestal, Inc.*, 949 F.2d 504, 511-12 (1st Cir. 1991) ("[The] courts of appeals which have considered the question have permitted recovery by third parties who equitably come to stand in the trustee's shoes."); *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995) ("Although § 506(c) in terms refers only to recovery by the trustee, we . . . have held that administrative claimants other than trustees have standing to recover under § 506(c), particularly when no other party has an economic incentive to seek recovery on the claimant's behalf."); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74, 76-77 (5th Cir. 1991) ("Despite the seemingly unambiguous language, courts have allowed a [non-trustee] claimant to use § 506(c) . . . ."); *North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991) ("No compelling policies are served by a restrictive reading of § 506(c) . . . ."), *cert. denied*, 506 U.S. 821, 113 S.Ct. 71, 121 L.Ed.2d 37 (1992). Policy considerations and equitable concerns, however, are impermissible bases for statutory interpretation when, as

here, the language of the statute is clear and unambiguous. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (eschewing policy determinations for which the Bankruptcy Code gives no authority); *McCuskey v. Central Trailer Servs., Ltd.*, 37 F.3d 1329, 1332 (8th Cir. 1994) (declining trustee's invitation to turn to bankruptcy policy considerations to guide interpretation of plain language of Bankruptcy Code § 546(a)(1)). "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). We therefore respectfully disagree with those circuits holding that § 506(c) grants non-trustees standing to seek recovery under that section.

More persuasive is the determination of the Court of Appeals for the Fourth Circuit that "[t]he language of § 506(c) is clear and unambiguous. It grants only trustees the authority to seek recovery of postpetition costs and expenses from the collateral of a secured creditor." *Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994); *see also K & L Lakeland*, 128 F.3d at 206-07.

Moreover, although we base our holding on the plain language of § 506(c), we note that the position espoused by Hartford would undermine the carefully crafted equality-of-distribution scheme fundamental to the operation of the Bankruptcy Code. *See Begier v. IRS*, 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code."). Entirely consistent with this scheme is 506(c)'s

grant of standing to a bankruptcy trustee to recover administrative expenses from the property securing the claim of an allowed secured creditor, the proceeds of which recovery become a portion of the bankruptcy estate and are distributed pro rata among creditors according to their relative priorities. In contrast, the result of the position urged by Hartford would be that the administrative expenses recovered by a non-trustee claimant would not be incorporated into the bankruptcy estate or otherwise contributed to appropriate distribution of the debtor's property among its creditors. Such a result would be incompatible with the fundamental equal distribution goals of the Bankruptcy Code. In addition, as the Fourth Circuit suggested in *JKJ Chevrolet*, to allow non-trustee claimants (other than the debtor) to bring § 506(c) claims is to invite "a flood of satellite litigation by those seeking to avoid a pro rata division of the estate." 26 F.3d at 484 n.6 (citing *Boyd v. Dock's Corner Assocs. (In re Great N. Forest Prods., Inc.)*, 135 B.R. 46, 69 (Bankr. W.D. Mich. 1991)).

Finally, for the first time in this litigation Hartford asserts standing under Federal Rule of Bankruptcy Procedure 7071 to enforce the terms of the final financing order of the Bankruptcy Court. *See* Fed. R. Bankr. P. 7071 (incorporating Fed. R. Civ. P. 71) ("When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party . . . ."). The final financing order directs the Debtor to pay expenses out of cash collateral covered by Magna's security interest. *See In re Hen House Interstate, Inc.*, No. 91-45623-293, para. 24, at 17 (Final Order of Bankruptcy Court). Rule 7071, however, was not the basis of the claim asserted by Hartford in its application to the Bankruptcy

Court, in which Hartford sought to surcharge Magna's collateral pursuant to Bankruptcy Code § 506(c). Having stated only a § 506(c) surcharge claim in its complaint and throughout this litigation, Hartford cannot now, after the case has come to the rehearing en banc stage in this Court, embark upon a different claim never pleaded to the Bankruptcy Court and assert that any standing to bring that claim is a ground for standing in the § 506(c) claim it actually brought. That Hartford might or might not have standing to bring a Rule 7071 claim is beside the point, for that is a new claim that cannot initially be brought forward at the appellate level.[5] We therefore do not reach the issue of Hartford's standing

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5. Moreover, the Rule 7071 claim is not within the scope of our order granting "rehearing en banc . . . limited to the issue of standing." *Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, No. 97-3859EMSL (8th Cir. Sept. 22, 1998) (Order Granting Rehearing En Banc). Although our order (the purpose of which, after all, was to limit rehearing to a single issue, not to invite new claims) refers generically to "the issue of standing," we could only have intended that phrase to mean the issue of § 506(c) standing. In its motion to file a supplemental brief after rehearing en banc had been granted, Hartford made no reference to Rule 7071. Instead, Hartford emphasized that "[t]he question of standing under section 506(c) is one of great importance to administrative claimants such as Hartford, and the Court's en banc resolution of this issue will affect many such claimants in innumerable bankruptcy cases." Appellee's Motion to File Supplemental Brief at 2-3 (Sept. 22, 1998). Likewise, Magna, in its suggestion for rehearing en banc, limited discussion to § 506(c). For these reasons, it strains credulity to think that our order granting rehearing en banc invited Hartford to assert a Rule 7071 claim at this late stage. We are thoroughly satisfied that our review is limited to the issue of Hartford's standing to bring a § 506(c) claim, the claim that Hartford in fact asserted.

to bring a Rule 7071 claim. *Cf. Stupak-Thrall v. United States*, 89 F.3d 1269, 1275 n.4 (6th Cir. 1996) (declining to hear issue urged for first time to panel in reply brief and reasserted in supplementary brief to court en banc; otherwise party raising argument on en banc rehearing would "be allowed to deprive the panel of the ability to address the issue first"), *cert. denied*, 519 U.S. 1090, 117 S.Ct. 764, 136 L.Ed.2d 711 (1997); *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir.) (order denying rehearing) (holding party who failed to assert argument in district court, and in supplemental briefing and oral argument before panel, "cannot be permitted to raise a new issue for the first time on petition for rehearing in the court of appeals"), *cert. denied*, 498 U.S. 891, 111 S.Ct. 233, 112 L.Ed.2d 193 (1990).

The single issue for determination by this Court en banc remains the issue stated at the outset: whether Hartford has standing under § 506(c). We hold that § 506(c) permits only the trustee to proceed under that section. Hartford therefore lacks standing to surcharge Magna's collateral under § 506(c).

III.

United States, Internal Revenue Service v. Boatmen's First National Bank, 5 F.3d 1157 (8th Cir. 1993), which held that parties other than the trustee have standing to surcharge property securing the claim of an allowed secured creditor under § 506(c), is overruled. The decision of the District Court is reversed. The case is remanded to the District Court with instructions that the Bankruptcy Court be directed to vacate its judgment and dismiss Hartford's § 506(c) claim for lack of standing.

HEANEY, Circuit Judge, dissenting, with whom MCMILLIAN, RICHARD S. ARNOLD, BEAM, and MURPHY, Circuit Judges, join.

Today this court rejects the view of four other circuits, ignores the teaching of the leading bankruptcy treatise, and departs from the well-established view that administrative claimants have § 506(c) standing to enforce administrative claims against secured creditors who have benefitted by the goods or services provided by an administrative claimant. Because the prudential standing doctrine requires this court to confer § 506(c) standing to Hartford, I respectfully dissent.

An administrative expense may be surcharged against a secured creditor's collateral if the expense was necessary, reasonable, and directly benefitted the secured creditor, *Brookfield Prod. Credit Ass'n v. Borron*, 738 F.2d 951, 952-53 (8th Cir. 1984), or if a secured party either directly or impliedly consented to the expense, *Daniel v. AMCI, Inc. (In re Ferncrest Court Partners)*, 66 F.3d 778, 782 (6th Cir. 1995). The original panel opinion stated that

> Magna agreed to the continued operation of the Debtor's businesses in the hopes of receiving a greater return through reorganization rather than through liquidation. Magna thereby "agreed to accept the expenses and risks associated with [the] anticipated benefit." One such expense is workers' compensation insurance. Under Missouri law, an operating business is obligated to maintain workers' compensation insurance unless it can demonstrate that it has the ability to self-insure. See Mo. Rev. Stat. § 287, 280 (Supp. 1998).

Hartford Underwriters Ins. Co. v. Magna Bank (In re: Hen House Interstate, Inc.), 150 F.3d 868, 872 (8th Cir. 1998) (quoting *IRS v. Boatmen's First National Bank*, 5 F.3d 1157, 1160 (8th Cir. 1993)). The original panel further held that "Magna consented to the workers' compensation insurance expenses," and proceeded to the issue of standing. *Hartford*, 150 F.3d at 871. The panel concluded that Hartford had standing under *Boatmen's*. *See id.* at 871. This court granted Hartford's petition for rehearing solely on the issue of standing.

I agree with the court that the sole issue before us is whether Hartford has standing to surcharge Magna's collateral. I believe it has. Four circuits have adopted this view, *See e.g. North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991), *cert. denied*, 506 U.S. 821, 113 S.Ct. 71, 121 L.Ed.2d 37 (1992); *In re Parque Forestal, Inc.*, 949 F.2d 504, 511 (1st Cir. 1991); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74, 77 (5th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91, 94 (3d Cir. 1986). The court's view is also supported by the leading scholarly work on bankruptcy:

> The reasoning behind the approach which extends standing to creditors and other claimants is that a secured creditor who received a direct benefit from the rendition of services or provision of goods by an administrative claimant . . . should have the collateral charged for that benefit, regardless of whether the proceeds of the charge are paid to the trustee in reimbursement for the trustee's prior payment to the claimant, or are paid to the claimant directly. Otherwise, if the trustee does not have available funds to pay the claimant, the trustee has no economic incentive to seek a recovery under section 506(c) with respect to amounts that will be paid over to the claimant. As a result, the secured creditor may obtain a windfall at the expense of the unpaid claimant.

4 Collier on Bankruptcy ¶ 506.05[8] at 506-142-43 (Lawrence P. King ed., 15th ed. 1998). The majority view has been in effect since 1986, and I believe that Congress has acquiesced to the majority's resolution of the conflict. *See Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987).

Had Congress intended to limit § 506(c) standing to trustees, it could have included the word "only" in the statute. Because it failed to do so and because Congress did not expressly deny § 506(c) standing to administrative claimants, the prudential standing doctrine dictates that this court confer § 506(c) standing on Hartford.

Any determination of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In addition to the threshold requirements of Article III, the applicable prudential standing requirement is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." *Data Processing Serv. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). While Congress

can limit standing beyond that allowed by Article III of the United States Constitution, "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest . . . ." *Id.* at 154, 90 S.Ct. 827. While *Data Processing* applied the zone-of-interests test to suits under the Administrative Procedure Act, the Supreme Court has since listed it among the other generally applicable prudential standing requirements. *See Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Where Congress has neither expressly allowed nor denied administrative claimants § 506(c) standing, the Supreme Court has held that "Congress legislates against the background of our prudential standing doctrine, which applies *unless it is expressly negated*." *Id.* at 163, 117 S.Ct. 1154 (emphasis added); *see also Data Processing*, 397 U.S. at 154, 90 S.Ct. 827 ("Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise").

There can be no doubt that Hartford has Article III standing, and because Congress has not expressly negated the prudential standing doctrine in § 506(e), Hartford also has § 506(c) standing. To satisfy Article III standing, a plaintiff must allege that (1) he or she suffered or imminently will suffer an injury in fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) a favorable court decision is likely to redress the injury. *See Florida Gen. Contractors v. Jacksonville*, 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (citations omitted). Here, Hartford provided statutorily-required workers' compensation insurance and was not paid. Magna consented to the court-authorized expenditures and benefitted from them in two

ways. First, Magna benefitted from the heightened possibility it would recoup the full value of its security interest. Second, it benefitted insofar as liquidating the various businesses as going concerns optimized its profit from liquidation. Finally, a favorable decision to Hartford would undoubtedly redress its injury.

Having satisfied the general requirements for Article III standing, "the applicable prudential standing requirement [is] 'whether the interest sought to be protected by [Hartford] is *arguably* within the zone of interests to be protected or regulated by the statute.' " *Bennett*, 520 U.S. at 162, 117 S.Ct. 1154 (citing *Data Processing*, 393 U.S. at 153, 90 S.Ct. 827) (emphasis added). "The [zone-of-interests] test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (footnote omitted). Section 506(c) provides that "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim. 11 U.S.C. § 506(c). Here, it is clear that Hartford's claim was reasonable and necessary. Indeed, the continuance of workers' compensation insurance was mandated by law if Hen House was to continue in business. Additionally, the expenditures benefitted Magna as discussed above. Finally, Hartford's § 506(c) standing is consistent with other provisions of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. §§ 503(a), 1109(b).

The court joins the Fourth Circuit[6] in its assertion that conferring § 506(c) standing to administrative claimants circumvents the Bankruptcy Code's distribution scheme:

> Allowing a claimant to proceed directly against a secured creditor would circumvent this distribution scheme, potentially causing an inequitable division of the estate. For example, if an estate has no unencumbered assets, an administrative claimant recovering directly from a secured creditor might receive full reimbursement while other administrative claimants, whose services were also necessary to the preservation of the estate, would receive nothing. An administrative claimant proceeding against a secured creditor in effect would be granted priority over the other claimants in its same class. We are of the opinion that if Congress had intended to alter so fundamentally the structure and principles underlying bankruptcy proceedings, it would have done so expressly.

Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.), 26 F.3d 481, 484 (4th Cir. 1994) (footnotes and citations omitted). In my view, Congress

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6. While the court relies heavily on the reasoning of the Fourth Circuit, even that court has recognized the fact that a secured creditor should not be able to immunize its windfall under the theory that administrative claimants lack § 506(c) standing. *See Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 485 n.7 (4th Cir. 1994) (recognizing the possibility that "a bankruptcy court could grant derivative standing to a claimant . . . to prosecute a § 506(c) action.").

expressly altered the distribution scheme when it enacted § 506(c). As noted in our *Boatmen's* opinion, administrative expenses are generally paid from the unencumbered assets of the bankruptcy estate rather than secured collateral. *See* 5 F.3d at 1159; *see also In re JKJ Chevrolet, Inc.*, 26 F.3d at 483 (recognizing general rule). Section 506(c) clearly alters the general rule by requiring secured creditors to pay administrative expenses when, *inter alia*, the expenditures benefit the secured creditor. Thus, the obligation created by § 506(c), not the identity of the party enforcing that obligation, alters the distribution scheme.

The court departs from its view that it will not entertain equitable considerations and joins the Fourth Circuit in its argument that conferring § 506(c) standing to administrative claimants will lead to inequitable division of bankruptcy estates because particular administrative claimants may be compensated while other administrative claimants, unsecured creditors, or even secured creditors could go unpaid. Even if this were true, this is a criticism of the obligation created by § 506(c), not of allowing a particular party to enforce that obligation. Congress, not the courts, codified an equitable mechanism in § 506(c) by which a secured creditor may be compelled to reimburse the administrative expenses that preserve or dispose of the secured property to the extent that those expenditures have increased the property's value.

Finally, I believe that Hartford's claim that Federal Rule of Bankruptcy Procedure 7071 provides an independent basis for recovery may properly be considered by this court. The court argues that because Hartford did not raise this claim before the original panel in this case and raised it in the first

instance before this court en banc, we should not consider the claim. In my view, Hartford may be excused from failing to raise the claim before the original panel because the facts of this case fall squarely within the law established in our *Boatmen's* opinion; and as Chief Judge Bowman correctly noted in our original panel opinion, " '[o]nly the court en banc can overrule another panel's decision.' " *Hartford*, 150 F.3d at 871 (quoting *Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996)). Because we are writing on a clean slate as a court en banc, we may certainly entertain Hartford's claim now.

Federal Rule of Bankruptcy Procedure 7071 incorporates Rule 71 of the Federal Rules of Civil Procedure, which provides: "When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if he were a party . . . ." Fed. R. Civ. P. 71. Hartford argues that the bankruptcy court, with Magna's express consent, directed the debtor to pay the premiums for the workers' compensation insurance that Hartford provided. Because it was the intended beneficiary of the order, Hartford argues that it may recover from Magna under Rule 7071. In the interests of judicial economy, I would hold that, even if Hartford does not have standing under § 506(c), it should recover under Rule 7071.

Today this court overrules six years of Eighth Circuit law, rejects the views of four other circuits, and ignores the teaching of the leading bankruptcy treatise. It does this in disregard of the prudential standing doctrine. For the reasons stated above, I respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JULY 27, 1998

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3859

In re: Hen House Interstate, Inc.,

Debtor.

Hartford Underwriters Insurance Company,

Movant – Appellee,

v.

Magna Bank, N.A., formerly known as
Magna Bank of Illinois, N.A.,

Respondent – Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: May 12, 1998
Filed: July 27, 1998

Order Granting Rehearing Sept. 22, 1998.

Before BOWMAN, Chief Judge, HEANEY and HANSEN, Circuit Judges.

BOWMAN, Chief Judge.

Appendix B

Hartford Underwriters Insurance Company brought an action pursuant to the Bankruptcy Code, *see* 11 U.S.C. §§ 503 and 506(c) (1994), against Magna Bank,[1] a secured creditor of Hen House Interstate, Inc. (hereinafter "Debtor"), the debtor in the underlying bankruptcy. Hartford sought the payment of workers' compensation insurance premiums that went unpaid by the Debtor during the period in which the Debtor attempted a Chapter 11 reorganization. The Bankruptcy Court[2] ordered the surcharge of Magna's collateral pursuant to § 506(c) to secure payment of the insurance premiums, and the District Court[3] affirmed. Magna appeals.

Magna contends that Hartford lacked standing to bring its claim under § 506(c), that Magna's collateral may not be surcharged on the basis that it agreed to the continuation of the Debtor's business, that the judgment constitutes an impermissible modification of the original financing order, and that the equities favor denying the surcharge of Magna's collateral. We affirm.

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1. Magna Bank is the successor in interest to the rights, claims, and interests of Landmark Bank of Illinois. We refer to Magna herein notwithstanding that certain facts pertain to Landmark Bank prior to its acquisition by Magna.

2. The Honorable David P. McDonald, United States Bankruptcy Judge for the Eastern District of Missouri.

3. The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

Appendix B

I.

The Debtor owned and operated a number of businesses located throughout the Midwest, including restaurants, service stations, gift stores, and an outdoor advertising firm. On September 5, 1991, the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. During the course of its Chapter 11 case, the Debtor remained in possession of its assets and continued to operate its businesses. Ultimately, the Debtor's efforts to reorganize were unsuccessful and, while still operating under Chapter 11, the Debtor liquidated its assets through a combination of going-concern sales and sales of its shut-down properties. Thereafter, in January 1993, the Debtor's Chapter 11 case was converted into a Chapter 7 liquidation proceeding.

At the time the Debtor initially filed for bankruptcy relief, it owed Magna approximately $4.1 million. As security for repayment of the debt, Magna had a security interest in essentially all of the Debtor's real and personal property. The day after the Debtor filed its Chapter 11 petition, Magna agreed to loan the Debtor $300,000 to help finance the Debtor's reorganization efforts. The Debtor moved for authorization of the post-petition loan. In its financing order, to which both Magna and the Debtor agreed, the Bankruptcy Court granted the motion authorizing the loan and, in addition, authorized the Debtor's use of cash collateral that was subject to Magna's security interest to pay expenses set forth in an attached budget. *See* Final Order para. 24, at 17. The budget provided for workers' compensation expenses in the amount of approximately $8,600 per month. Further, the financing order required that the Debtor "pay or cause

to be paid all ordinary and necessary expenses of operation . . . which are allowed in the Budget." Final Order para. 25, at 18. The financing order also contained a provision that "no expenses of administration of Debtor's Chapter 11 case . . . shall be charged against [Magna] or [its collateral] . . . pursuant to § 506(c) of the Bankruptcy Code . . . without the prior written consent of [Magna], and no such consent shall ever be implied." Final Order para. 33, at 24-25. After entry of the financing order, Magna disbursed the entire $300,000 to the Debtor.

During the period in which the Debtor attempted its Chapter 11 reorganization, Hartford provided workers' compensation insurance coverage. Under the terms of the policy, the Debtor was required to make monthly payments to Hartford. Despite the fact that the Debtor quit paying the monthly premiums, Hartford continued to provide coverage. At one point, the Debtor paid a portion of the amount due Hartford, but to date $51,871.40 remains in unpaid premiums for the period in which Hartford provided the coverage. Hartford filed for relief pursuant to 11 U.S.C. § 503 seeking the allowance of its claim as an administrative expense and 11 U.S.C. § 506(c) seeking to recover its claim by surcharging Magna's collateral.

II.

"As the second reviewing court, our standards are the same as the district court's; we review the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*." *Halverson v. Estate of Cameron (In re Mathiason)*, 16 F.3d 234, 235 (8th Cir. 1994). Magna first urges this Court

to reconsider and overrule our prior decision, *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157, 1159 (8th Cir. 1993), wherein we held that third parties have standing to surcharge a secured creditor's collateral under § 506(c).[4] Section 506(c) provides, "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c). In *Boatmen's*, we interpreted this provision to allow administrative claimants to assert their claims under § 506(c). As a three judge panel, we lack authority to reconsider *Boatmen's*, *see Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996) ("Only the court en banc can overrule another panel's decision."), and therefore hold that Hartford had standing under § 506(c) to assert its administrative claim for unpaid workers' compensation insurance premiums.

Magna next contends that the Bankruptcy Court and the District Court erred in allowing Hartford to surcharge Magna's collateral under § 506(c). Generally, administrative expenses may not be charged against secured collateral but instead share in the distribution of the unsecured collateral pursuant to 11 U.S.C. § 503. *See Boatmen's*, 5 F.3d at 1159. Section 506(c) creates an exception to this general rule,

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4. As a member of the panel, I dissented from the decision in *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157 (8th Cir. 1993), because the plain language of 11 U.S.C. § 506(c) gives only the trustee standing to surcharge a secured creditor's collateral. *See id.* at 1161. I remain of that view today but recognize *Boatmen's* as controlling precedent in this Circuit.

providing that an expense may be surcharged against a secured creditor's collateral if the expenditure was necessary, reasonable, and directly benefited the secured creditor. *See Brookfield Prod. Credit Ass'n v. Borron*, 738 F.2d 951, 952 (8th Cir. 1984). In the alternative, a secured party's collateral may be surcharged where the secured party either directly or impliedly consented to the expense. *See Daniel v. AMCI, Inc. (In re Ferncrest Court Partners, Ltd.)*, 66 F.3d 778, 782 (6th Cir. 1995).

Magna does not dispute that workers' compensation insurance is a necessary and reasonable expense. Magna does contend, however, that the expense incurred by Hartford in providing workers' compensation insurance did not directly benefit Magna because the Debtor's reorganization efforts ultimately failed and the assets were liquidated. For support, Magna relies on the Bankruptcy Court's statement that "the continued operation of the business failed to improve [Magna's] recovery." Bankruptcy Ct. Mem. Op. at 9. The District Court, however, did not clarify whether it viewed Magna as having received a direct benefit. In any event, while we would be inclined to view Magna as having received a direct benefit, *see Boatmen's*, 5 F.3d at 1160 ("The 'benefit' . . . lies in the *ambition* of the creditor to preserve and improve its secured collateral and the *opportunity* to realize that ambition.") (emphasis added), we need not reach that holding today because we conclude that Magna consented to the workers' compensation insurance expenses.

We believe that the case at bar is in all material aspects similar to *Boatmen's*. In *Boatmen's*, a company that owned and operated a string of dry cleaning stores filed for Chapter

11 bankruptcy. A secured creditor, Boatmen's Bank, agreed to extend post-petition credit so that the debtor company could continue its operations. During the time in which the debtor operated under Chapter 11, its payroll taxes went unpaid. The Internal Revenue Service (IRS) filed an administrative claim pursuant to § 506(c) to recover the unpaid payroll taxes plus interest and penalties. We held that "when a secured creditor agrees to the preservation of the debtor business as a going concern and that preservation requires the payment of payroll taxes, any unpaid post-petition taxes may be charged to the secured collateral." *Boatmen's*, 5 F.3d at 1160.

We have essentially the same set of circumstances here. Magna agreed to the continued operation of the Debtor's businesses in the hopes of receiving a greater return through reorganization rather than through liquidation. Magna thereby "agreed to accept the expenses and risks associated with [the] anticipated benefit." *Id.* One such expense is workers' compensation insurance. Under Missouri law, an operating business is obligated to maintain workers' compensation insurance unless it can demonstrate that it has the ability to self-insure. *See* Mo. Rev. Stat. § 287.280 (Supp. 1998). Moreover, Magna expressly consented in the financing order to the provision authorizing the Debtor's use of its cash collateral for necessary operating expenses, which specifically included workers' compensation insurance premiums, and to the provision requiring that the Debtor pay or cause to be paid all necessary and ordinary expenses.

Magna attempts to distinguish in two ways the facts in *Boatmen's* from those in the present case. First, Magna points

to the fact that in *Boatmen's* the bank had signed an agreement to subordinate its post-petition liens to administrative expenses. Magna thus argues that Boatmen's expressly consented to the surcharge of its collateral for administrative expenses. Magna also points out that this Court in *Boatmen's* found that the bank had received an overall benefit from the debtor's efforts at reorganization. Magna therefore contends that there may have been other sufficient grounds upon which this Court could have allowed the IRS to surcharge Boatmen's collateral. The holding of *Boatmen's*, however, turns neither on Boatmen's agreement to subordinate its liens to administrative expenses nor on the receipt of any direct benefit by Boatmen's. Rather, the holding turns on Boatmen's agreement to the preservation of the debtor's business as a going concern. We find neither attempt to distinguish *Boatmen's* persuasive. Just as in *Boatmen's*, Magna agreed to the continued operation of the Debtor's businesses and therefore consented to the payment of workers' compensation insurance.

In further support of Magna's argument that it did not consent to the payment of workers' compensation insurance, Magna directs us to the provision contained in the financing order, which provides that "no expenses of administration of Debtor's Chapter 11 case . . . shall be charged against [Magna] or [its collateral] . . . pursuant to § 506(c) of the Bankruptcy Code . . . without the prior written consent of [Magna], and no such consent shall ever be implied." Final Order para. 33, at 24-25. This provision, however, does not affect our conclusion that Magna *did* consent to the use of its cash collateral for expenses associated with keeping the Debtor's businesses operating. Furthermore, we believe that

an agreement by a debtor and a secured creditor to prohibit the payment of § 506(c) administrative expenses from the secured creditor's collateral would operate as a windfall to the secured creditor at the expense of administrative claimants. We therefore conclude that such a provision is unenforceable. *See McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991) ("[A] provision [that attempts to immunize a secured creditor from surcharge payment obligations under § 506(c)] is not enforceable in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its preservation or proper disposal."); *see also In re Willingham Invs., Inc.*, 203 B.R. 75, 79 (Bankr. M.D. Tenn. 1996).

Magna next asserts that the Bankruptcy Court's order constitutes an impermissible modification of the original financing order in violation of 11 U.S.C § 364(e), which provides:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt . . . does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith . . . .

11 U.S.C. § 364(e). The purpose of § 364(e) is to encourage the extension of credit to debtors by permitting creditors to rely on a bankruptcy court's authorization of the transaction. *See Burchinal v. Central Washington Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1488 (9th Cir. 1987). Magna

argues that, because the financing order contained the provision against surcharging Magna's collateral without its consent, the decision by the Bankruptcy Court violates § 364(e). This argument fails, however, because we have concluded above that Magna consented to the payment of workers' compensation insurance premiums by agreeing to the continued operation of the Debtor's businesses. The Bankruptcy Court did not modify or reverse any provision contained in the financing order.

Finally, Magna argues that a surcharge of its collateral in this situation would be grossly inequitable. For support, Magna asserts that the payments already made to Hartford by the Debtor will cover any existing or future claims that may be asserted under the workers' compensation policy and that Hartford could have minimized its exposure by canceling the policy when the premiums first went unpaid. We find neither of these assertions compelling enough to justify a finding that the Bankruptcy Court abused its discretion.

III.

The order of the District Court, affirming the order of the Bankruptcy Court, is affirmed.

HANSEN, Circuit Judge, concurring.

I concur in the court's opinion because, like Chief Judge Bowman, I must respect as controlling circuit precedent the panel decision in *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157 (8th Cir. 1993). I agree with the Chief Judge's view first expressed his dissent in *Boatmen's* and reiterated today in footnote four of the court's opinion, that the plain language of 11 U.S.C. § 506(c) gives only a trustee standing to surcharge a creditor's collateral, but that is not the current law of this circuit, and only an en banc court can, and in my view, should, change it.

ORDER
Sept. 22, 1998

Appellant Magna Bank's suggestion for rehearing is granted. The court's opinion and judgment of July 27, 1998, are vacated. The grant of rehearing en banc is limited to the issue of standing.

The clerk is directed to set this case for oral argument at 10:00 a.m. on Thursday, October 22, 1998, in St. Paul, Minnesota. Each side will be granted twenty (20) minutes to present its oral argument.

The parties are directed to submit twenty-five (25) copies of the briefs previously filed in the appeal. These additional copies are due October 2, 1998.

APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED SEPTEMBER 10, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96-CV-1991 CAS

In Re:

HEN HOUSE INTERSTATE, INC.

Debtor.

MAGNA BANK OF ILLINOIS,

Appellant,

v.

THE HARTFORD UNDERWRITERS INSURANCE COMPANY,

Appellee.

MEMORANDUM

This is an appeal from a final order of the United States Bankruptcy Court for the Eastern District of Missouri granting appellee The Hartford Underwriters Insurance Company's ("Hartford") Application for Allowance of

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Administrative Expense Pursuant to 11 U.S.C. § 503 and Charge Against Collateral Pursuant to 11 U.S.C. § 506(c). *In re Hen House Interstate, Inc.*, No. 91-45623-293 (Bankr. E.D. Mo. Aug. 14, 1996). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 158(a) and Rule 8001 of the Federal Rules of Bankruptcy Procedure.

The Bankruptcy Court's order permits Hartford to impose a charge on appellant Magna Bank of Illinois, N.A.'s ("Magna")[1] collateral under 11 U.S.C. § 506(c), for the administrative expense of worker's compensation insurance premiums. Hartford provided workers' compensation insurance to the debtor, Hen House Interstate, Inc., ("Debtor") from September 1, 1991 through September 1, 1992.

In this appeal, Magna contends the Bankruptcy Court erred as follows:

> (1) in holding that Hartford, as a party other than a bankruptcy trustee or debtor-in-possession, had standing to seek relief under the provisions of 11 U.S.C. § 506(c);
>
> (2) in holding that because Magna agreed to the continuing operation of the Debtor's business with

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1. Appellant is presently known as Magna Bank, N.A. It is the successor in interest to the rights, claims and interests of Landmark Bank of Illinois under various financing and loan documents. For purposes of convenience, appellant is referred to as Magna throughout this memorandum, although certain facts pertain to Landmark Bank of Illinois prior of its acquisition by Magna.

the hope that the continuation would allow Magna to recover more than it would in a liquidation, Hartford could surcharge Magna's collateral 11 U.S.C. § 506(c) for any reasonable and necessary services provided to the Debtor, without requiring any showing that such services directly benefited Magna, and in granting Hartford's 11 U.S.C. § 506 (c) application even though no much showing was made in this case;

(3) in finding that it would not be inequitable to allow Hartford to surcharge Magna's collateral under 11 U.S.C. § 506(c) for unpaid worker's compensation insurance premiums; and

(4) in allowing Hartford to surcharge certain charges against Magna's collateral pursuant to the provisions of 11 U.S.C. § 506(c) after having previously entered a final order pursuant to the provisions of 11 U.S.C. § 364(c) and (d) that explicitly prohibited the imposition of any such charges against Magna's collateral without Magna's prior written consent, which consent was never given.

For the reasons which follow, the Court concludes the decision of the Bankruptcy Court should be affirmed.

Discussion.

In reviewing the judgment of the bankruptcy court, this Court reviews legal conclusions *de novo* and findings of fact

under a clearly erroneous standard. *In re Kiellsen*, 53 F.3d 944, 946 (8th Cir. 1995); *In re Muncrief*, 900 F.2d 1220, 1225 (8th Cir. 1990). The parties agree that issues 1, 2 and 4 present questions of law requiring *de novo* review, while issue 3 is subject to review under an abuse of discretion standard.

The Court adopts the Bankruptcy Court's statement of procedural background of this case and its factual findings, including the joint stipulation by the parties, as set forth in the Bankruptcy Court's Memorandum Order of August 14, 1996, at 1-6.

1. *Standing.* Magna argues that because Hartford is neither the bankruptcy trustee nor the debtor-in-possession, it lacks standing to seek recovery under 11 U.S.C. § 506(c). Magna contends the literal language of that statute clearly limits standing to the trustee and the debtor-in-possession, and thus there is no basis for permitting a third party to recover under § 506(c).

The Eighth Circuit has resolved this question contrary to Magna's position. *In United States I.R.S. v. Boatmen's First Nat'l Bank of Kansas City*, 5 F.3d 1157, 1159 (8th Cir. 1993) ("*Boatmen's*"), the Court unequivocally held that an administrative claimant has standing to recover under § 506(c). This Court is not free to disregard binding Eighth Circuit precedent. Thus, the Court concludes the Bankruptcy Court did not err in holding that Hartford, as an administrative claimant, has standing to recover under 11 U.S.C. § 506(c).

2. *Benefit to Magna*. Magna next argues that the Bankruptcy Court erred as a matter of law in holding Hartford was entitled to surcharge Magna's collateral for the amounts in question simply because Magna agreed to the continued operation of Debtor's business in Chapter 11 with the hope that the continuation would allow Magna to recover more than in a liquidation. Magna contends Hartford did not meet its burden to establish that the administrative expense directly benefited Magna.

Section 506(c) of the Bankruptcy Code is an exception to the general rule that administrative expenses of a bankruptcy estate may not be charged against secured collateral but rather share in the distribution of unencumbered assets of the debtor pursuant to 11 U.S.C. § 503. *Boatmen's*, 5 F.3d at 1159. Section 506(c) expresses and applies "the equitable principle that a lienholder may be charged with the reasonable costs and expenses incurred by the debtor . . . which are required to preserve or dispose of the property subject to lien to the extent the lienholder derives a benefit therefrom." 4 L. King, *Collier on Bankruptcy* ¶ 506.04, at 506-49 (15th Ed. rev. 1997).

Under § 506(c), an administrative expense may be surcharged against a secured creditor's collateral if three elements are established: (i) the expense was necessary; (ii) the expense was reasonable; and (iii) the expense directly benefited the secured creditor. *Brookfield Production Credit Ass'n v. Borron*, 738 F.2d 951, 952 (8th Cir. 1984) ("*Borron*"). Magna does not dispute the Bankruptcy Court's determination that the cost of the insurance provided by Hartford was a reasonable and necessary expense of

continuing Debtor's business operations. Magna contends only that the third element is not met, in that Magna was not directly benefited by the worker's compensation insurance.

Relying on the *Boatmen's* decision, the Bankruptcy Court held that because Magna agreed to the continued operation of the Debtor's business with the hope that the continuation would allow it to recover more than it would in a liquidation, it accepted the risk of being charged with the reasonable and necessary costs and expenses of preserving the business. This Court agrees. Where a holder of secured credit consents to the preservation of a debtor's business as a going concern, a "court may treat such consent as an advance acknowledgement that certain of the costs and expenses incurred would benefit such holder. Thus, when such consent has been given, the courts will allow a greater latitude with respect to allowance of costs and expenses." 4 *Collier* ¶ 56.04[3][a][i] at § 506-54,-55; *see Boatmen's*, 5 F.3d at 1160 (allowing recovery of postpetition payroll taxes including penalty and interest where the secured creditor consented to preservation of the debtor's business as a going concern); *In re Annett Ford, Inc.*, 64 B.R. 946, 947 (D. Neb. 1986) (allowing recovery of payroll taxes, penalty and interest which were costs of unsuccessful postpetition operation of business consented to by secured creditor).

In this case, after Magna initially sought relief from the automatic stay, it decided instead to make a $300,000.00 post-petition debtor-in-possession loan to the Debtor. In so doing, Magna anticipated it would receive a greater return through a Chapter 11 filing in which the Debtor's operations

would continue in the hope of a reorganization, rather than from an immediate liquidation of the Debtor's property outside of Chapter 11. Magna was the primary beneficiary of Debtor's continued operation. The payment of worker's compensation insurance was an expense necessary to Debtor's continued operation, as worker's compensation insurance or a demonstrated ability to self-insure is required by law in Missouri. Thus, it follows under *Boatmen's* and *Annett Ford* that the insurance expense may be charged against Magna, even though the Debtor's Chapter 11 reorganization was ultimately unsuccessful.

The fact that the secured creditor in *Boatmen's* specifically agreed to subordinate its post-petition superpriority liens to legitimate administrative expenses of the bankruptcy estate, while relevant to the Eighth Circuit's decision, is not controlling and does not require a different result in this case. The holding of *Boatmen's* turns on the secured creditor's agreement to the preservation of the debtor as a going concern, not its agreement to be subordinated to administrative expenses. *Boatmen's*, 5 F.3d at 1160.

The Eighth Circuit's earlier *Borron* decision, on which Magna relies, is distinguishable because the secured creditor in *Borron* did not consent to continuation of the debtor's business as a going concern. As a result, the Court applied a stricter standard under which a direct, quantifiable benefit to the secured credit must be shown before an administrative expense may be surcharged against secured collateral.

Therefore, the Court concludes the Bankruptcy Court did not err in holding that Hartford could surcharge Magna's

collateral under 11 U.S.C. § 506(c) for worker's compensation insurance premiums.

3. *Abuse of Discretion.* Next, Magna contends that the Bankruptcy Court abused its discretion in permitting Hartford to surcharge Magna's collateral under 11 U.S.C. § 506(c), when Hartford (i) had already received premium payments in excess of any insurance benefits it would have to pay out on the Debtor's behalf, and thus is not seeking to recover for actual losses sustained but rather to obtain a profit; (ii) displayed an extraordinary lack of diligence in protecting its rights under the insurance policy and thus failed to take reasonable efforts to reduce its claim; and/or (iii) expressly acknowledged that it did not rely on the provisions of § 506(c) in providing unsecured credit to the Debtor.

The Court will not reverse the Bankruptcy Court's decision unless that court abused its sound discretion. *In re Jones Truck Lines, Inc.*, 63 F.3d 685, 686 (8th Cir. 1995). "Abuse of discretion will be found only when the . . . court's decision is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Richards v. Aramark Services, Inc.*, 108 F.3d 925, 927 (8th Cir. 1997) (citation omitted). Generally, a discretionary decision will not be reversed if the decision "remains within 'the range of choice' available to the . . . court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a 'clear error of judgment.' " *Walser v. Toyota Motor Sales, U.S.A., Inc.*, 43 F.3d 396, 401 (8th Cir. 1994) (quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)).

Magna contends that the Bankruptcy Court's decision to permit the Hartford surcharge was a clear error of

judgment. This Court disagrees. Magna does not contest the Bankruptcy Court's factual findings that (i) Magna stood to benefit the most from a successful reorganization of the Debtor; (ii) the Debtor's attempted reorganization was primarily for the benefit of Magna; (iii) Magna was the primary beneficiary of the Debtor's continued operations; and (iv) the cost of the worker's compensation insurance was a reasonable and necessary expense of continuing the business. Under these circumstances, it is not an abuse of discretion to require Magna to bear the reasonable and necessary expense of insurance coverage the Debtor was required to carry by state law.

Therefore, the Court concludes the Bankruptcy Court did not abuse its discretion in holding that Hartford could surcharge Magna's collateral under 11 U.S.C. § 506(c) for worker's compensation insurance premiums.

4. *Final Debtor In Possession Order*. Finally, Magna argues that the Bankruptcy Court erred in allowing Hartford to surcharge Magna's collateral under § 506(c), after the Court previously entering a final order pursuant to 11 U.S.C. § 364(c) and (d) which explicitly prohibited the imposition of any administrative expense charges against Magna's collateral without Magna's prior written consent.[2]

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2. *See* Final Order Authorizing Debtor to Obtain Post-Petition Secured Credit, Granting Senior Liens and Administrative Priority Expense, Modifying Automatic Stay, Providing Adequate Protection and Authorizing Agreements with Landmark Bank of Illinois, dated October 25, 1991 (the "Final DIP Order"). Paragraph 33 of the Final DIP Order states,

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Magna argues that (i) under 11 U.S.C. § 364(e), a bankruptcy court cannot modify or alter its own postpetition financing order; (ii) Magna had a right to rely on the enforceability of the Final DIP Order; and (iii) by permitting Hartford to recover under § 506(c), the Bankruptcy Court deprived Magna of its protections under the Final DIP Order, and effectively modified the Order. Magna relies primarily on the Seventh Circuit's decision in *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1355 (7th Cir. 1990) ("*Kham & Nate's*") for the proposition that a postpetition financing order cannot be modified by a bankruptcy court, even if it was erroneous or illegal when entered.[3]

The Bankruptcy Court's determination that Magna was not entitled to the protection of § 364(e) derives from its interpretation of the 8th Circuit's *Boatmen's* decision. The Bankruptcy Court found the pertinent inquiry in determining

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> 33. Except for the Carve-Out [$10,000.00 for professional fees], no expenses of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceeding under the Bankruptcy Code, shall be charged against [Magna] or the Collateral, without the prior written consent of [Magna], and no such consent shall ever be implied from any action, inaction or acquiescence by [Magna].

3. The language of 11 U.S.C. § 364(e) is limited to reversal or modifications of orders on appeal. For purposes of this motion, the Court assumes without deciding that § 364(e) applies to a bankruptcy court's modification of its own orders.

whether a charge should be imposed under § 506(c) is whether the secured creditor agreed to the continuation of the Debtor's business with the hope that the continuation would allow the creditor to recover more than it would in a liquidation. Record on Appeal at 29, p. 10. The Court stated the Final DIP Order provision was "not relevant to the inquiry", *id.*, and noted further, "A secured creditor who is willing to benefit from a successful reorganization may not circumvent its responsibility to pay for necessary expenses with the use of disclaimers such as the one used in Paragraph 33 of the Final [DIP] Order." *Id.*, pp. 9-10.

The parties have not cited any authority from the Eighth Circuit concerning the effect of 11 U.S.C. § 364(e) on a claim for a surcharge of administrative expenses under § 506(c), and the Court has found none in independent research. Some authority exists in other jurisdictions that provisions in postpetition financing orders which prohibit the payment of § 506(c) administrative expenses from secured collateral are unenforceable. *See, e.g., In re Willingham Invs., Inc.*, 203 B.R. 75, 79 (Bankr. M.D. Tenn 1996) (vacating portion of a postpetition cash collateral order which attempted to prohibit payment of administrative expenses from the secured creditor's collateral, where the continuation of the debtor's business in Chapter 11 occurred primarily for the benefit of the undersecured creditor); *McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (Bankr. W.D. Mich. 1991) (refusing to enforce provision of cash collateral order attempting to immunize secured creditor from any surcharge payment obligations under 11 U.S.C. § 506(c) "in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its

preservation or proper disposal"); *see also* Stephen A. Stripp, *Balancing of Interests in Orders Authorizing Use of Cash Collateral in Chapter 11*, 21 Seton Hall L. Rev. 562, 578-79 (1991) (noting that while many cash collateral orders operate to prohibit claims under § 506(c), debtors, who are parties to the order, should not be permitted to waive the rights of other potential claimants).

The Court finds these authorities persuasive. As discussed more fully above, the Debtor's attempted reorganization was primarily for the benefit of Magna, Magna was the primary beneficiary of the Debtor's continued operations, and the cost of the workers' compensation insurance was a reasonable and necessary expense of continuing the Debtor's business. Under these circumstances, to permit Magna and the Debtor to agree between themselves that the expense of mandatory workers' compensation insurance may not be charged against Magna's collateral would be inequitable and would constitute a windfall for Magna at Hartford's expense.

In the alternative, the Court also concludes the Final DIP Order provision is unenforceable against Hartford based on due process considerations. It is undisputed that Hartford did not know Debtor had filed for bankruptcy protection until 1993. Hartford had no notice of the proceedings which led up to issuance of the Final DIP Order in October 1991, was not a party to the Order, and was not served with the Order. While notice of the Final DIP Order was given to the twenty largest unsecured creditors in accordance with Federal Rule of Bankruptcy Procedure 4001(c)(1) and (d)(1), only the Debtor and Magna's predecessor in interest were signatories to the Order.

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It is true that a creditor must be able to rely on a bankruptcy court's financing order. Nonetheless, the rationale of the *Kham & Nate's* decision cited by Magna has been held not to apply where a debtor and lender ignore the due process rights of third parties. *See In re Marrs-Winn Co., Inc.*, 103 F.3d 584, 595 (7th Cir. 1996); *In re Tek-Aids Indus., Inc.*, 145 B.R. 253, 258-59 (Bankr. N.D. Ill. 1992); *In re Visual Indus., Inc.*, No. 94-3414, slip op. at 12 n.6 (D.N.J. Sept. 26, 1994). Because Hartford had no notice of the Final DIP Order and no opportunity to challenge it, the Court concludes the Order's provision prohibiting the charge of any administrative expense against Magna's collateral without its consent is not enforceable against Hartford.

For these reasons, the Court concludes the Bankruptcy Court did not err in holding that Paragraph 33 of the Final DIP Order does not preclude the imposition of a surcharge against Magna's collateral under 11 U.S.C. § 506(c).

Conclusion.

For the foregoing reasons, the Court concludes that the judgment of the Bankruptcy Court should be affirmed. An appropriate judgment will accompany this memorandum.

s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT
JUDGE

Dated this 10th day of September, 1997.

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED AUGUST 14, 1996

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION OF MISSOURI
EASTERN DIVISION

Case No. 91-45623-293
Chapter 7

In re

HEN HOUSE INTERSTATE, INC.,

Debtor.

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Movant,

– v –

MAGNA BANK OF ILLINOIS,

Respondent.

Motion No. 463

MEMORANDUM OPINION

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JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334, 151, and 157 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" pursuant to 28 U.S.C. §157(b)(2)(A), which the Court may hear and determine.

PROCEDURAL BACKGROUND

1. On September 5, 1991, Hen House Interstate, Inc. (Debtor), filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. On October 25, 1991, the Court entered its Final Order Authorizing Debtor to Obtain Post-Petition Secured Credit, Granting Senior Liens and Administrative Priority Expense, Modifying Automatic Stay, Providing Adequate Protection and Authorizing Agreements with Landmark Bank of Illinois (the Final Order).[1]

2. After the issuance of the Final Order, Magna Bank of Illinois provided this Debtor with debtor-in-possession financing in the amount of $300,000 and allowed the Debtor to use Magna's cash collateral.

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1. When the Final Order was entered, Landmark Bank of Illinois extended financing to the Debtor. Later, Magna Bank of Illinois succeeded to the interest of Landmark Bank of Illinois. For convenience, reference is made to Magna throughout this opinion, notwithstanding that certain facts pertain to Landmark Bank prior to its acquisition by Magna.

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3. On January 20, 1993, this case was converted to a Chapter 7 proceeding. The Court appointed Robert J. Blackwell to serve as trustee of the Chapter 7 estate.

4. On June 29, 1993, Hartford Underwriters Insurance Company (Hartford) filed an Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. § 503 and Charge Against Collateral Pursuant to 11 U.S.C. § 506(c) (the Hartford Application). In the Hartford Application, Hartford asked the Court to authorize it to employ section 506(c) and recover the unpaid workers' compensation premiums Debtor owed it for coverage provided post-petition from property securing Magna's claim. Magna objected to the Hartford Application.

5. Magna argues that the Court should deny the Hartford Application for the following reasons:

1. The Court cannot modify or ignore provisions in the Final Order specifically prohibiting the type of relief requested in the Hartford Application.

2. The equities in this case weigh against allowing Hartford to charge Magna's collateral with the remaining outstanding balance on the Debtor's workers' compensation insurance premiums.

3. Hartford's claim for unpaid workers' compensation does not satisfy the narrow standard for recovery under section 506(c) enunciated by the Eighth Circuit in *Brookfield Production Credit Association v. Borron*, 738 F.2d 951 (8th Cir. 1984),

which Magna maintains remains in existence and applies to this case, notwithstanding the broad section 506(c) standard used by the Eighth Circuit in *I.R.S. v. Boatmen's First National Bank of Kansas City*, (hereinafter *Boatmen's*) 5 F.3d 1157 (8th Cir. 1993).

In response, Hartford argues that:

1. The provisions of the Final Order should not apply to Hartford because it was not aware of the Debtor's bankruptcy proceedings until March of 1993 and did not receive actual notice of the Final Order's entry.

2. The equities of the case favor Hartford.

3. The broad standard for recovery under section 506(c) used by the Eighth Circuit in the *Boatmen's* decision applies to this case and has been satisfied by Hartford.

6. The Court conducted an evidentiary hearing. The evidence consisted of a Trial Stipulation of Facts agreed upon and submitted jointly by Hartford and Magna and four exhibits consisting of (i) the Debtor's Emergency Motion for Order Authorizing Debtor to Obtain Post-Petition Financing Pursuant to 11 U.S.C. 364, and Granting Adequate Protection to Pre-Petition Secured Party; (ii) the Emergency Order entered by the Court on September 6, 1991, authorizing the debtor-in-possession financing on an emergency basis; (iii) the Final Order; and (iv) the transcript, together with all

exhibits thereto, including the deposition of Mary Zuk, Hartford's designated representative, who testified on Hartford's behalf. No other evidence was adduced at trial.

JOINT STIPULATION OF FACTS

The parties stipulated to the following facts as true:

1. Hen House filed Chapter 11 proceedings on September 5, 1991.

2. Hartford provided workers' compensation insurance coverage for the Debtor for the period from September 1, 1991, through September 1, 1992. The Debtor was required to carry insurance during that period.

3. The Debtor previously paid premiums totaling $82,294 to Hartford on account of the insurance

4. Hartford claims that it still is owed $51,871.40 for the insurance premiums for the post-petition period during which the Insurance was in force. Magna has no evidence to the contrary with respect to the amount outstanding.

5. Hartford has paid losses on worker's compensation claims made under the insurance totaling $32,551. In addition, Hartford presently has reserved, but has not been paid, $38,549 on account of potential losses. As of August 1993, the amount held in reserve on account of potential losses was $20,821. The total amount of losses actually paid by Hartford under the insurance increased by $179 from August of 1993 to April 5, 1994. No further claims were made as of September 1992.

6. In making the post-petition debtor-in-possession loan to the Debtor, Magna anticipated that it, as well as the Debtor's other creditors, would receive a greater return through a Chapter 11 filing in which the Debtor's operations would continue in hope of reorganization, rather than from an immediate liquidation of the Debtor's property outside of Chapter 11.

7. When the Debtor filed a petition under Chapter 11 on September 5, 1991, the Debtor anticipated that it would continue its operations and reorganize its business. The reorganization prospects did not materialize and sometime in 1992, the Debtor liquidated its assets through a combination of going-concern sales and sales of shut-down properties.

8. As of September 5, 1991, the Debtor owed Magna approximately $4 million.

9. Magna has not received the full amount owed to it by the Debtor. Magna has lost approximately $1,500,000 in principal, plus additional amounts for unpaid interest and attorneys fees and expenses.

10. Magna previously disbursed to the Debtor the full $300,000 available under the post-petition debtor-in-possession loan it made to the Debtor.

11. Hartford was not aware of the Debtor's bankruptcy proceedings until March of 1993.

The Court accepts and adopts those facts set forth in the above Joint Stipulation of Facts along with the following findings as the Court's findings of fact:

Paragraph 33 of the Final Order provided the following express prohibition against charging Magna or its collateral with administrative expenses under section 506(c) of the Bankruptcy Code. The Final Order stated:

> 33. Except for the Carve-Out [$10,000 for professional fees], no expenses of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceeding under the Bankruptcy Code, shall be charged against Landmark or the Collateral, whether pursuant to 506(c) of the Bankruptcy Code or otherwise, without the prior written consent of Landmark, and no such consent shall ever be implied from any action, inaction or acquiescence by Landmark.

DISCUSSION

The issues in the present case are: 1) whether Hartford, an administrative claimant who provided workers' compensation insurance post-petition for the Debtor, has standing to recover those expenses under 11 U.S.C. § 506(c); and 2) whether payment of workers' compensation insurance is a reasonable and necessary expense for preserving or disposing of the Debtor's bankruptcy estate.[2] Magna, the

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2. The Court notes that, initially, Hartford's standing to bring suit under § 506(c) was challenged, *see* Objection of Magna Bank of Illinois to Hartford Underwriters Insurance Company Application for Allowance of Administrative Expense Pursuant to 11 U.S.C.

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secured creditor, stipulates to the fact that it agreed to the continued operation of the business post-petition.

The bankruptcy estate generally must pay administrative expenses out of the unencumbered assets of the debtor. *Boatmen's*, 5 F.3d 1157, 1159 (8th Cir. 1993). In most instances, it cannot charge those expenses to the secured creditors against their collateral pursuant to section 503. An exception to that rule exist under section 506(c). Section 506(c) states, "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of the claim." The section was intended to prevent the secured creditor from benefitting at the expense of the trustee or debtor in possession. It applies in situations where an estate

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Section 506(c), but at the hearing held on this matter, Magna conceded that under the Eighth Circuit's *Boatmen's* decision, Hartford has standing. The majority of the Circuits which have published opinions on this issue have read section 506(c) broadly enough to permit administrative claimants standing to recover. *See Boatmen's*, 5 F.3d at 1159; *North County Jeep and Renault, Inc. v. Gen. Elec. Credit Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229 (9th Cir. 1991), *cert. denied*, 506 U.S. 821, 113 S.Ct. 71 (1992); *In re Parque Forestal, Inc.*, 949 F.2d 504 (1st Cir. 1991); *New Orleans Pub. Serv. Inc. v. First Fed. Sav. and Loan Ass'n. (In re Delta Towers, Ltd.)*, 924 F.2d 74 (5th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91 (3d Cir. 1986). *Contra Ford Motor Credit Co. v. Reynolds & Reynolds Corp. (In re JKJ Chevrolet)*, 26 F.3d 481, 486 (4th Cir. 1994) (holding that only trustee has standing to bring suit under section 506(c)).

continues to operate primarily for the benefit of the secured creditor.

In *Boatmen's* the Court required Boatmen's, a secured creditor, to pay post-petition payroll taxes as costs of preserving the debtor as a going concern. *Id.* The case involved a company that owned and operated a string of dry cleaning stores. *Id.* at 1158. When the company filed for bankruptcy, the secured creditor, Boatmen's, agreed to extend credit to debtor post-petition so that it could continue operating and sell its business as a going concern. *Id.* at 1160. It did so with the experience of receiving a higher return on its investment from the sale of a going concern rather than a liquidation sale. *Id.* In fact, more than half of the debtor's stores were sold as going concerns. *Id.* at 1158-59. The Court explained its holding, "[t]he creditor, however, in the expectation of an overall benefit, agreed to accept the expenses and risks associated with that anticipated benefit. One of those expenses was payroll taxes, and one of the risks was nonpayment of the taxes and its consequences." *Id.* The Court viewed the unpaid taxes as a de facto loan from the government without which the estate could not have continued operations. *Id.* The creditor in Boatmen's agreed to accept the risk of continuing operations and the risk paid off. Boatmen's received a greater return on its investment than it would have in a liquidation.

The *Boatmen's* court frequently cited *United States v. Annett Ford, Inc. (In re Annett Ford)*, 64 B.R. 946 (D. Neb. 1986). The *Annett Ford* court addressed the same issues as the *Boatmen's* court but the secured creditor in *Annett Ford* was less fortunate than the secured creditor in *Boatmen's*.

Despite the fact that the continued operation of the business did not prove successful, the *Annett Ford* court found, "[t]he preservation of the going concern value of a business can constitute a benefit to a secured creditor under 11 U.S.C. § 506(c)." *Id.* at 947. The *Boatmen's* court adopted the *Annett Ford* court's analysis and did not limit its holding to recovery for administrative claimants who receive overall financial benefit. *Boatmen's*, 5 F.3d at 1160.

The *Boatmen's* and *Annett Ford* courts based their holdings on the theory that when a creditor agrees to the continued operation of a debtor's business, it also agrees to accept the risks associated with the potential benefit it seeks. Administrative claims such as unpaid payroll taxes and penalties are a foreseeable risk.

Although facts in the present case are similar to those in *Boatmen's*, they are more like the facts in *Annett Ford*. The secured creditor, Magna, agreed to the continued operation of Debtor's business under a Chapter 11 plan of reorganization. Virtually all real and personal property of the Debtor was encumbered by and subject to Magna's first priority perfected lien. Magna stood to benefit the most from a successful reorganization. When Magna agreed to the continuing operation of the Debtor, it openly expressed its hopes of receiving an increase on its return. In so agreeing, Magna implicitly agreed to accept the risks associated with the hoped for benefit. Under Missouri workers' compensation laws, an operating business is obligated to maintain workers' compensation insurance unless it can demonstrate that it has the ability, alone or in a group, to self-insure itself. See Mo. Rev. Stat. § 287.280 (1994). Thus, the cost of the insurance

Hartford provided was a reasonable, necessary and foreseeable expense of continuing this business operations. Unfortunately for Magna, the risk did not produce the desired results, and the continued operation of the business failed to improve its recovery. However, this does not preclude the administrative claimant from recovering. A secured creditor who is willing to benefit from a successful reorganization may not circumvent its responsibility to pay for necessary expenses with the use of disclaimers such as the one used in Paragraph 33 of the Final Order.

In its brief to the Court, Magna makes three arguments against allowing Hartford to collect its claim from Magna's collateral. First, Magna argues that this Court cannot modify or ignore Paragraph 33 of the Final Order which prohibits charging Magna's collateral for post-petition administrative expenses. It argues that: 1) to do so would discourage creditors from making post-petition loans; 2) Magna loaned the money in reliance on the language in Paragraph 33; and 3) Hartford did not know about the bankruptcy proceeding until after it extended the credit and could not have done so in reliance on rights under section 506(c). Magna misunderstands the holding in *Boatmen's*. The pertinent question under section 506(c) is whether the secured creditor agreed to the continuing operation of the business with the hope that the continuation would allow it to recover more than it would have in a liquidation. If it did, then according to the Eighth Circuit, along with the potential for benefit, it accepted the risk of foreseeable costs and expenses of preserving the business. Paragraph 33 is not relevant to the inquiry. An administrative claimant has standing under section 506(c) if it extends reasonable and necessary services

to the debtor. Furthermore, the administrative claimant is not required to show reliance on section 506.

Second, Magna argues that equities in the case weigh against allowing Hartford to charge Magna's collateral. The Court disagrees. Equities do not permit Magna to receive a windfall at the expense of the Debtor or the estate's administrative claimants. Because the attempt to reorganize was primarily for the benefit of Magna, Magna must pay the costs.

Third, Magna attempts to distinguish the facts in the present case from *Boatmen's* and asks the Court to apply the stricter standard for recovery under section 506(c) enunciated in an earlier Eighth Circuit case, *Brookfield Prod. Credit Ass'n. v. Borron*, 738 F.2d 951 (8th Cir. 1984). Magna's reliance on *Borron* is misplaced. The *Borron* case involved Debtors who used the proceeds from the sale of the secured creditor's collateral to pay other creditors. The Circuit Court held that the Debtors, not the secured creditor, benefitted from the continued operation of the business and it refused to charge the secured creditor for administrative expenses. The facts in the present case are distinguishable from those in *Borron*. The primary beneficiary of Hen House's continued operation was Magna and the payment of workers' compensation insurance was an expense necessary to Hen House's continued operation. The extension of insurance coverage was a benefit to the secured creditor who would not have had the opportunity to attempt greater recovery without it. Workers' compensation insurance or a demonstrated ability to self-insure one's potential liability, like taxes, is required by law in Missouri. Unlike the *Borron*

debtor, Hen House did not take proceeds from Magna's collateral and use it to pay its unsecured creditors.

The Court holds that Magna, a secured creditor who agreed to the preservation of the debtor's business as a going concern, shall be charged with the payment of post-petition workers' compensation premiums under 11 U.S.C. § 506(c) as reasonable and necessary expenses.

An Order consistent with this Memorandum Opinion will be entered this date.

s/ David P. McDonald
DAVID P. McDONALD
U. S. Bankruptcy Judge

DATED: August 14, 1996
St. Louis, Missouri

Appendix D

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION OF MISSOURI
EASTERN DIVISION

Case No. 91-45623-293
Chapter 7

In re

HEN HOUSE INTERSTATE, INC.,

Debtor.

HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Movant,

– v –

MAGNA BANK OF ILLINOIS,

Respondent.

Motion No. 463

ORDER

For the reasons set forth in the Memorandum Opinion filed this date, it is

Appendix D

ORDERED THAT Magna Bank of Illinois, a secured creditor who agreed to the preservation of the debtor's business as a going concern, shall be charged with the payment of post-petition workers' compensation premiums under 11 U.S.C. § 506(c) as reasonable and necessary expenses.

s/ David P. McDonald
DAVID P. McDONALD
U. S. Bankruptcy Judge

Dated: August 14, 1996
St. Louis, Missouri

APPENDIX E — RELEVANT STATUTES

11 U.S.C. § 503

§ 503. Allowance of administrative expenses.

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including

(1)(A) the actual, necessary costs and expenses of its preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case:

(B) any tax —

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by —

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.

* * *

11 U.S.C. § 506

§ 506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the

amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless —

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

* * *

Appendix E

11 U.S.C. § 1109

§ 1109. Right to be heard.

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

* * *